

DECISION AND FINDINGS
IN THE
CONSISTENCY APPEAL OF
OLGA VELEZ LUGO FROM
AN OBJECTION BY THE
PUERTO RICO PLANNING BOARD

September 9, 1994

EXECUTIVE SUMMARY

Ms. Olga Velez Lugo (Appellant) appealed to the Secretary of Commerce (Secretary) to override the Commonwealth of Puerto Rico's objection to her proposal to construct a wood dock and restore a boat ramp. As explained in more detail below, the Secretary declines to override Puerto Rico's objection, and therefore federal licenses or permits for the project may not be allowed.

This appeal arises under the Coastal Zone Management Act (CZMA), an act administered by the National Oceanic and Atmospheric Administration (NOAA), an agency within the Department of Commerce. Section 307 of the CZMA provides that any applicant for a required federal license to conduct an activity affecting any land or water use or natural resource of the coastal zone shall provide to the permitting agency a certification that the proposed activity complies with the enforceable policies of a state's coastal management program (CMP), including the Commonwealth of Puerto Rico's CMP.

The Appellant has requested approval from the U.S. Army Corps of Engineers (Corps) for the project. Because Puerto Rico has objected to the project, the Corps may not grant a license or permit, unless the Secretary finds that the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security.

Background

Ms. Olga Velez Lugo (Appellant) is the owner of an improved lot located adjacent to the Salinas Bay in Salinas, Puerto Rico. The Appellant proposes to construct a wood dock 50 feet in length, restore an existing boat ramp and level a wetland/mudflat area by depositing approximately 400 cubic meters of fill. The dock and boat ramp would be used by the Appellant for private recreational purposes. The site of the proposed pier construction and boat ramp reconstruction lies within public domain land under the jurisdiction of the Commonwealth of Puerto Rico.

The Appellant applied to the Corps for a permit for the proposed project. In conjunction with that federal permit application, the Appellant submitted a certification that her project is consistent with Puerto Rico's CMP.

On June 5, 1992, the Puerto Rico Planning Board (PRPB), the Commonwealth of Puerto Rico's coastal management agency, objected to the Appellant's project on the ground that it is not consistent with the enforceable policies contained in Puerto Rico's CMP. Specifically, the PRPB alleged that the project violates policies that provide for the restriction of activities that impede or prevent free physical access to beach areas and that could cause the deterioration of natural systems, including

mangroves and habitats of endangered species. In addition, the PRPB alleged that the Appellant's proposed project would adversely impact natural systems for private benefit and contribute to the degradation of one of Puerto Rico's designated critical coastal wildlife areas.

Under the CZMA, the PRPB's consistency objection precludes any federal agency from issuing any license or permit necessary for the proposed project, unless the Secretary finds that the activity is either consistent with the objectives or purposes of the CZMA (Ground I) or is necessary in the interest of national security (Ground II).

By letter dated July 9, 1992, the Appellant filed with the Department of Commerce a notice of appeal from the PRPB's objection to her proposed project. The Appellant argued that the project satisfies Ground I. The Appellant did not argue Ground II issues. Upon consideration of the entire record, including submittals by the Appellant and the PRPB, and written information from federal agencies, the Secretary made the following findings.

Ground I: The Proposed Project is Not Consistent with the Objectives or Purposes of the CZMA

To find that the proposed activity satisfies Ground I, the Secretary must determine that the project satisfies all four of the elements specified in the regulations implementing the CZMA (15 C.F.R. § 930.121). If the project fails to satisfy any one of the four elements, it is not consistent with the objectives or purposes of the CZMA and federal licenses or permits may not be granted.

The Secretary determined that Element 2 of Ground I is dispositive of the issues in this appeal and made the following findings: The proposed project would have cumulative, adverse effects that would contribute to the degradation of an important mangrove wetland/mudflat area and a critical coastal wildlife area which supports important fishery resources, including endangered species. The proposed project's minimal contribution to the national interest does not outweigh these substantial, cumulative adverse effects on the natural resources of the coastal zone. Element 2 of Ground I was not satisfied and it was unnecessary to address the other three elements.

Conclusion

The Secretary found that the proposed project is not consistent with the objectives or purposes of the CZMA (Ground I). Accordingly, federal agencies may not issue the necessary permits for the project.

DECISION

I. Factual Background

Ms. Olga Vélez Lugo (Appellant) is the owner of an improved lot located adjacent to the Salinas Bay, in Salinas, Puerto Rico. "Coastal Zone Management Act Consistency Appeal" (Appellant's Initial Brief), dated December 2, 1992, at 2. A partial fringe of mangroves parallels the shoreline of the Appellant's property. Id. at 2. The Appellant proposes to construct a 50-foot wood pier, restore an existing boat ramp and level a wetland area of her property by depositing approximately 400 meters of fill. Id. at 2-4; Letter of Patria G. Custodio, Chairperson, Puerto Rico Planning Board (PRPB) to Olga Vélez Lugo (PRPB Objection) dated June 5, 1992 at 1. The purpose of the landfill operation is to level her property in order to correct the flooding created by runoff water from neighboring lots. Appellant's Initial Brief at 2; Letter of Olga Vélez Lugo to Margo E. Jackson, National Oceanic and Atmospheric Administration (NOAA) (Appellant's Final Brief), dated April 2, 1993, at 1. The pier and restored boat ramp will be used by the Appellant for private recreational purposes. Letter of Jorge R. Arce, P.E., to Timothy R.E. Keeney, U.S. Department of Commerce (Notice of Appeal) dated July 9, 1992, at 2-3.

The Appellant applied to the U.S. Army Corps of Engineers (Corps) for a permit¹ for her construction, restoration and landfill project. In conjunction with that federal permit application the Appellant submitted to the Corps a certification that the proposed activity is consistent with Puerto Rico's federally approved Coastal Management Program (CMP). The PRPB² reviewed the certification pursuant to section 307(c)(3)(A) of the Coastal Zone Management Act of 1972, as amended (CZMA), 16 U.S.C. § 1456(c)(3)(A).

On June 5, 1992, the PRPB objected to the Appellant's proposed project on the grounds that it violates Puerto Rico's CMP policies numbered 17.04 and 18.03 which provide, respectively, for the restriction of activities that impede or prevent free physical access to beach areas and that could cause the deterioration of natural systems, including mangroves and habitats of endangered species. PRPB Objection at 2-3. In addition, the PRPB stated its concern that the site of the proposed pier construction and boat ramp reconstruction lies within the maritime-terrestrial zone, and is in public domain land under the jurisdiction of the Commonwealth of Puerto Rico's

¹ The Corps permit is required by section 404 of the Federal Water Pollution Control Act, as amended, (Clean Water Act), 33 U.S.C. § 1344.

² The PRPB is Puerto Rico's federally approved coastal management agency.

Department of Natural Resources. See 3 L.P.R.A. §§ 151 et seq. (1989). Id. at 3. Of specific concern to the PRPB is that the Appellant's proposed project will adversely impact natural systems for private benefit and contribute to the degradation of the Punta Arena habitat, one of Puerto Rico's designated critical coastal wildlife areas. Id. at 2-3.

Under section 307(c)(3)(A) of the CZMA and 15 C.F.R. § 930.131, the PRPB's consistency objection precludes the Corps from issuing a permit for the activity unless the Secretary of Commerce finds that the activity is either consistent with the objectives or purposes of the CZMA (Ground I), or necessary in the interest of national security (Ground II).

II. Appeal to the Secretary of Commerce

By letter dated July 9, 1992, in accordance with section 307(c)(3)(A) of the CZMA and 15 C.F.R. Part 930, Subpart H, the Appellant filed with the Department of Commerce a notice of appeal from the PRPB's objection to her proposed project. Notice of Appeal. After the Appellant perfected her appeal by filing additional information, the PRPB filed a response brief. Letter of Patria G. Custodio, Chairperson, PRPB, to Margo E. Jackson, NOAA (PRPB Initial Brief), dated December 30, 1992.

As provided by its regulations, NOAA asked four federal agencies to present their views regarding the merits of the appeal.³ All of the federal agencies responded. Public comments on issues germane to the decision in the appeal were also solicited by public notices published in the Federal Register, 57 Fed. Reg. 58793 (December 11, 1992), and the San Juan Star, (December 21, 22, and 23, 1992). No comments were received from the general public.

After the public comment period closed, NOAA provided the Appellant and the PRPB with an opportunity to file final responses to any submission filed in the appeal. Both the Appellant and the PRPB submitted final briefs. All documents and information received during the course of this appeal have been included in the administrative record. However, I will only consider those documents and information relevant to the statutory and the regulatory grounds for deciding an appeal. See Decision and Findings in the Consistency Appeal of Henry Crosby, December 29, 1992, at 2.

³ NOAA administers the CZMA. NOAA requested comments from the U.S. Department of the Interior - Fish and Wildlife Service (FWS), the Environmental Protection Agency (EPA), the National Marine Fisheries Service (NMFS) and the Corps.

Consistent with prior consistency appeals, I have not considered whether the PRPB complied with the laws of Puerto Rico in determining that the proposed activity is inconsistent with Puerto Rico's CMP. See Decision and Findings in the Consistency Appeal of Roger W. Fuller (Fuller Decision), October 2, 1992, at 5. Rather, I have examined the PRPB's objection only for the purpose of determining whether it was properly lodged, *i.e.*, whether the PRPB's objection complied with the requirements of the CZMA and its implementing regulations. Id. I conclude that the PRPB's objection was properly lodged.

III. Grounds for Overriding a State Objection

Having found that the PRPB's objection was properly lodged, I now examine the grounds provided in the CZMA for overriding the PRPB's objection. I will override the PRPB's objection if I find that the Appellant's proposed project is consistent with the objectives of the CZMA (Ground I), or otherwise necessary in the interest of national security (Ground II). See also 15 C.F.R. § 930.130(a).

The four elements of Ground I are:

1. The proposed activity promotes one or more of the competing national objectives or purposes contained in §§ 302 or 303 of the CZMA. 15 C.F.R. § 930.121(a).
2. The proposed activity's individual and cumulative adverse effects on the coastal zone are outweighed by its contribution to the national interest. 15 C.F.R. § 930.121(b).
3. The proposed activity will not violate the Clean Water Act or the Clean Air Act. 15 C.F.R. § 930.121(c).
4. There is no reasonable alternative available that would permit the proposed activity to be conducted in a manner consistent with the PRPB's coastal management program. 15 C.F.R. § 930.121(d).

To find that the proposed activity satisfies Ground I, I must determine that the activity satisfies all four of the elements specified above. If the project fails to satisfy any one of the four elements, I must find that the project is not consistent with the objectives or purposes of the CZMA.

The Appellant based her appeal on Ground I and did not plead Ground II. Therefore, I will only address Ground I issues. Because Element 2 is dispositive of this case, I will turn immediately to consideration of that element.

IV. Element 2

To satisfy Element 2 of Ground I, I must find that the proposed project's adverse effects on the natural resources or land and water uses of the coastal zone are outweighed by its contribution to the national interest. To do so, I must first determine what adverse effects the project will have on the coastal zone and what the project will contribute to the national interest. I then balance to see whether the project's adverse effects outweigh the national interest contribution.

A. Adverse Effects

The adverse effects of the proposed project must be analyzed both in terms of the project itself, and in terms of its cumulative effects. See Fuller Decision at 10. That is, I must look at the project in combination with other past, present and reasonably foreseeable future activities affecting the coastal zone. Id.

The Appellant argues that the proposed project will have no adverse effects, cumulative or otherwise, on the marine life or the natural resources of the coastal zone. Appellant's Initial Brief at 1-4; Notice of Appeal at 2-3. As mitigation for any potential damage to the mangroves which parallel the shoreline, the Appellant offers to plant mangroves on other sites where she owns property. Appellant's Initial Brief at 2. The Appellant did not provide supporting documentation or information to substantiate these claims.

In response to the Appellant's claims that her proposed project will not have any adverse effects, the PRPB argues that the construction of the pier and the reconstruction of the boat ramp will adversely affect the natural, coastal resources of the area. The PRPB states:

The proposed site is included as part of Punta Arena's habitat. Punta Arena was designated as a critical coastal wildlife area of Puerto Rico by the Department of Natural Resources (DNR). The Salinas Bay and nearby areas are used for feeding and/or travel routes by the Federally listed endangered Antillean manatees (Trichechus manatus manatus) and endangered green turtles, Chelonia mydas. . . . DNR Salinas Office personnel have sighted manatees in the Bay. Seagrass beds also exist (Thalassia testudinum) which feed marine organisms, such as the endangered green turtles and manatees.

* * *

The proposed pier, its associate facilities and the increased boat traffic generated will affect these habitats and contribute to the boat congestion problem which already exists in the Bay.

PRPB Objection at 2.

Moreover, the PRPB states that it is concerned about the leveling and filling aspect of the project, given that the proposed project site is in the process of recovery, having been restored after the previous property owner illegally filled the area. See Letter of Norma E. Burgos-Andújar, Chairwoman, PRPB, to Margo E. Jackson, NOAA, (PRPB Final Brief), dated April 15, 1993, at 2. The PRPB points out that the Appellant "wants to fill the property once again having knowledge of the previous Corps of Engineers permit denial and enforcement case." Id. In addition, the PRPB offers the following argument regarding the environmental effects of the proposed leveling of the site, which would require the deposit of fill:

Although the Appellant argues in the appeal brief that the proposed activity will not cause adverse effects on the coastal resources of the area, we believe that the existing marine resources would be impacted by the proposed project and by its associate activities. . . . [T]he area to be filled is part of a forested wetland consisting mostly of red mangroves (Rhizophora mangle) and mudflats. These systems protect the shoreline from erosion and the existing seagrass beds (Thalassia testudinum) from increased sediment loads. In addition, the mangrove trees serve as refuge for wildlife, nurseries for marine life and as natural filters for purifying water. The filling activity over the wetlands would alter the water table and consequently affect indirectly the mangroves [sic] trees. Therefore, the proposed project would contribute to the destruction and degradation of this system and its functions.

PRPB Initial Brief at 8-9.

Finally, the PRPB argues that the area's existing marine resources, which have been adversely impacted by the congestion of Salinas Bay, would be further jeopardized by the Appellant's proposed project and associated activities. See PRPB Initial Brief at 8. The PRPB states:

Due to the fact that the proposed site supports endangered species such as manatees and green turtles and these species have been affected by the congestion of boats along the Bay, we could not allow new structures that would jeopardize the existing marine habitat.

PRPB Initial Brief at 8.

The PRPB's position, that the proposed project will adversely affect the natural resources of the coastal zone, is supported by letters contained in the administrative record from the federal agencies that commented on this appeal. When the FWS initially reviewed the Appellant's proposed project⁴, it noted concern for the loss of "[v]aluable mudflat and fringing mangrove habitat . . . by small fills and piers" which have led to "fragmentation of shoreline habitat" and degradation of the area's natural systems. Letter of James P. Oland, Field Supervisor, Caribbean Field Office, FWS, to Lt. Colonel William T. Coffey, Deputy District Engineer, Corps, dated April 10, 1992, at 1. The FWS also noted its concerns regarding the recovery of the project site (following the illegal filling of the site by the previous owner and subsequent restoration.) Id. The FWS stated that it "continue[s] to recommend full restoration of the area." Id.

In response to NOAA's request for comments by federal agencies in the instant appeal, the FWS responded that "the project would adversely impact important wetlands and special aquatic sites in an area that has been subject to severe cumulative impacts." Letter of James W. Pulliam, Jr., Regional Director, FWS, to Angelica Fleites, NOAA, dated January 26, 1993, at 2.

EPA also submitted comments that support the PRPB and the FWS⁵ position that the project will adversely affect coastal resources:

[A]spects of all of the proposed activities would contribute to the destruction and degradation of . . . aquatic habitats, their functions and values.

⁴ The FWS responded to a Public Notice published by the Corps on March 13, 1992, requesting comments on the Appellant's proposed project. See Public Notice, dated March 13, 1992, appended to the Appellant's Initial Brief.

⁵ In response to NOAA's request for federal agency comments, NMFS submitted a copy of its response to a Corps Public Notice dated March 13, 1992. See Letter of Andreas Mager, Jr., Assistant Regional Director, Habitat Conservation Division, NMFS, to Lt. Col. William T. Coffey, Deputy District Engineer, San Juan Area, Corps, dated April 10, 1992, at 1. In that response, NMFS stated that it had assessed the Appellant's project in coordination with the FWS and concluded that "the work could adversely impact fishery resources" and therefore, the comments and recommendations of the FWS also represented those of the NMFS. Id.

* * *

[T]he area is designated as a critical coastal wildlife area of Puerto Rico by the Department of Natural Resources and supports endangered species such as the yellow-crowned night heron, the Bahama duck and the brown pelican.

Letter of Richard E. Sanderson, Director, Office of Federal Activities, EPA, to Ray Kammer, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce, dated January 27, 1993, at 1-2.

Regarding the Appellant's offer to mitigate any adverse impacts of the project by planting mangrove trees on another site, the PRPB argues that the Appellant has failed to properly consider all of the mitigating elements, such as minimizing impacts at the project site, prior to considering an alternative that would involve creating an alternative mangrove site⁶. See PRPB Initial Brief at 7. The PRPB also argues that although "the Appellant states she will not remove or destroy any mangrove tree, she would indirectly impact them by altering the laminar flow" that would, in turn, "contribute to the deterioration of the quality of the water of the Bay." Id. at 6 and 11.

The Appellant claims that objections to her proposed project are based on "a gross misunderstanding . . . of its nature as well as of its magnitude." Appellant's Initial Brief at 1. The Appellant argues that the PRPB objections to her proposed project are erroneously based upon an alleged meeting held at the PRPB office during which time the Appellant's husband allegedly represented, on the Appellant's behalf, that the purpose of the project was for commercial purposes; i.e., overflow parking for his marina located across Salinas Bay. See Notice of Appeal at 1-2; see also Appellant's Initial Brief at 1. However, a careful review of the administrative record reveals that there is considerable evidence to support the PRPB's position that the proposed project site supports endangered species, those species have been adversely impacted by the congestion of the area, and even small fill and construction projects will jeopardize the existing marine habitat. See PRPB Initial Brief at 8; see also federal agency comments noted supra.

⁶ "The Memorandum of Agreement (MOA) between the Corps of Engineers and the [EPA] for compliance with section 404 of the Clean Water Act establishes a clear sequence of avoidance of wetlands impacts which includes the evaluation of practicable alternatives, minimization as second and lastly compensation of unavoidable impacts through restoration or creation. According to the information provided, there is not any evidence that the Appellant has complied." PRPB Initial Brief at 7.

Based upon the evidence in the record, I am persuaded that the Appellant has not substantiated her argument that the mangroves on the project site would not be adversely impacted nor has she established that planting mangroves in another location would adequately mitigate any adverse effects on the proposed project site. In addition, I find that the proposed project would have cumulative, adverse effects that would contribute to the degradation of an important mangrove wetland/mudflat area and the Punta Arena habitat, which supports important fishery resources, including endangered species.

B. Contribution to the National Interest

The national interests to be balanced in Element 2 are limited to those recognized in or defined by the objectives or purposes of the CZMA. See Decision and Findings in the Consistency Appeal of Jorge L. Guerrero-Calderon (Guerrero-Calderon Decision), March 5, 1993, at 6. The CZMA identifies two broad categories of national interest to be served by proposed activities. The first is the national interest in preserving and protecting natural resources of the coastal zone. The second is encouraging development of coastal resources. See sections 302 and 303 of the CZMA.

The Appellant alleges that her proposed project serves the national interest of enhancing, preserving and protecting the natural resources of the coastal zone. In her initial brief, the Appellant states that her proposed project is "harmonious with the national policy stated in §1452(1) of the Coastal Zone Management Act: 'to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations'." Appellant's Initial Brief at 3.⁸

⁸ The term "cumulative effect" has been construed in prior consistency appeal decisions, as well as in the legislative history to the 1990 CZMA amendments, to mean the effects of an objected-to activity when added to the baseline of other past, present and reasonably foreseeable future activities. See e.g., U.S.A. Producing Inc., January 8, 1993, at 8; see also H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 970-72 (1990).

⁹ The Appellant also states in her initial brief that she would not object to public use of her pier and boat ramp, which could be construed as an indirect argument that her proposed project furthers the national interest of providing community access to the Salinas Bay for recreational purposes. See Appellant's Initial Brief at 4. However, this statement is contradicted by other statements in the Appellant's notice of appeal and final brief that the purpose of the pier and boat ramp is for private recreational use. See Notice of Appeal

The PRPB response to the Appellant's claims that her project contributes to the national interest is as follows:

The filling activity lacks a national interest because it is for the use and benefit of a particular person. . . . Furthermore, the nature of the proposed activities to construct a private pier and to repair a boat ramp for her family in public domain lands does not satisfy the national objectives. The project will be located within the maritime-terrestrial zone, which was designated by law as public domain lands. Therefore, the privatization of these lands does not represent the national interest as established in the [CZMA].

PRPB Final Brief at 1-2

The Appellant has not submitted any evidence, either direct or circumstantial, to support her assertions that her proposed project furthers the national interest. In addition, not one of the federal agencies commented that the Appellant's project would contribute to the national interest.

Based upon a review of the submissions to the record by the Appellant, the PRPB and the federal agencies commenting on this appeal, and given the lack of evidence produced by the Appellant to support her claims, I find that the contribution of the proposed construction, reconstruction, and leveling and filling of a wetland/mudflat area to the national interest in preserving and protecting the natural resources of the coastal zone would be minimal, at best.⁹

at 2-3; see also Appellant's Final Brief at 2. Given the fact that the Appellant's property is fenced, public access to the site would be unlikely, and in any event, extremely limited. See PRPB Initial Brief at 4. "The area in front of the proposed project is fenced and has a huge house in it." Id.

⁹ This conclusion is consistent with the findings in previous appeal decisions. See Decision and Findings in the Consistency Appeal of Ford S. Worthy, May 9, 1984, at 10 (the addition of a single boating marina would contribute minimally to the national interest in increasing recreational boating opportunities in the coastal zone); Fuller Decision at 14-15 (the filling of an erosion-prone wetland area would contribute minimally to the preservation of private property); and, Guerrero-Calderon Decision at 7 (the construction of a private pier would contribute minimally to the national interest in increasing recreational boating opportunities in the coastal zone).